93-735

Supreme Court, U.S.
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No._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

N. WALTER GOINS,

PETITIONER,

-VS-

DALE W. LANG, ET AL.,

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Did the court of appeals err in failing to order the correction of the district court docket which omitted Petitioner's properly filed affidavit of default against certain Respondents, thereby allowing Respondents to avoid answering complaint in the District Court, notwithstanding their argument case was removed from District Court to Bankruptcy Court?

PARTIES

The parties to the judgment of the court below are the following:

N. Walter Goins is the Petitioner.

Dale W. Lang, Ronald R. Jensen, Halcomm, Inc., a Minnesota corporation, RX Acquisition Limited Partnership, Syndicated Communications, Inc., and its subsidiary, Syncom Capital Corporation, and Broadcast Capital, Incorporated are the Respondents.

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PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE
EIGHTH CIRCUIT

Petitioner, N. Walter Goins, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on June 25, 1993; petition for rehearing denied on August 6, 1993, in the above entitled matter.

I. OPINIONS BELOW

The judgment of the United States Court of Appeals in Goins v. Lang, et al., Docket No. 92-3717MNMI, was entered on June 25, 1993 and was an unpublished per curiam opinion. It is unreported and is attached as Appendix XI.

The order of the United States Court

of Appeals for the Eighth Circuit dated August 6, 1993, denied petitioner's request for rehearing to the panel without opinion. It is unreported and is attached as Appendix XII.

The Memorandum Order of the United States District Court for the Minnesota District, dated October 10, 1992, granting Defendants' motions for summary judgment and dismissing plaintiff's claims is attached at Appendix X.

The original order of the district court denying plaintiff's motion for default judgment is unreported. It was entered by the district court on May 26, 1992. It is attached as Appendix VI.

The Memorandum and Order of the district court as plaintiff's motion to strike is unreported. It was entered on

May 8, 1992. It is attached as Appendix IV.

The order of the Magistrate Judge of April 14, 1992 is unreported. It is attached as Appendix II.

The order of the United States Bankruptcy Court for the Minnesota District denying the motion of respondents Syndicated Communications, Inc., Syncom Capital Corp., and Broadcast Capital, Inc. was entered May 4, 1992 and is unreported. It is attached as Appendix III.

The order of the United States Bankruptcy Court for the Minnesota District granting ex parte relief to respondents was entered May 14, 1992 and is unreported. It is attached as Appendix V.

The Transmittal of Remanded Adversary Proceeding Papers to Clerk of District Court by the United States Bankruptcy Court for the Minnesota District is dated June 9, 1992 and is unreported. It is attached as Appendix VII.

II. JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit in Goins v. Lang, et al., 92-3717MNMI was entered on June 25, 1993. Petitioner was timely filed his petition for rehearing to the panel, which was denied on August 6, 1993.

This Court has jurisdiction to review the judgment of the court of appeals by grant of this petition for a writ of certiorari based on 28 U.S.C.

1254 (1) and 28 U.S.C. 2101.

III. CONSTITUTIONAL PROVISIONS INVOLVED UNITED STATES

CONSTITUTION ARTICLE III: Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made,

or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other cases

before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

STATUTES/RULES INVOLVED

28 United States Code Section 157(a):

Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

28 UNITED STATES CODE 1334(a):

Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

28 UNITED STATES CODE 1334(b):

Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

28 UNITED STATES CODE 1452:

Removal of claims related to bankruptcy cases a) A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is

pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title. b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title.

FEDERAL BANKRUPTCY RULE 9027:

(a) Notice of Removal.

(b) Where filed; Form and Content. A notice of removal shall be filed with the clerk for the district and division

within which is located the state or federal court where the civil action is pending. The notice shall be signed pursuant to Rule 9011 and contain a short and plain statement of the facts which entitle the party filing the notice to remove, contain a statement that upon removal of the claim or cause of action the proceeding is core or non-core and, if non-core, that the party filing the notice does or does not consent to entry of final orders or judgment by the bankruptcy judge, and be accompanied by a copy of all process and pleadings.

(2) Time for Filing; Civil Action Initiated Before Commencement of the Case Under the Code. If the claim or cause of action in a civil action is pending when a case under the Code is commenced, a

notice of removal may be filed only within the longest of (A) 90 days after the order for relief in the case under the Code, (B) 30 days after entry of an order terminating a stay, if the claim or cause of action in a civil action has been stayed under 362 of the Code, or (C) 30 days after a trustee qualifies in a chapter 11 reorganization case but not later than 180 days after the order for relief.

(3) Time for Filing; Civil Action Initiated After Commencement of the Case Under the Code. If a case under the Code is pending when a claim or cause of action is asserted in another court, a notice of removal may be filed with the clerk only within the shorter of (A) 30 days after receipt, through service or

otherwise, of a copy of the initial pleading setting forth the claim or cause of action sought to be removed or (B) 30 days after receipt of the summons if the initial pleading has been filed with the court but not served with the summons. (b) Notice. Promptly after filing the notice of removal, the party filing the notice shall serve a copy of it on all parties to the removed claim or cause of action. (c) Filing in Non-Bankruptcy Court. Promptly after filing the notice of removal the party filing the notice shall file a copy of it with the clerk of the court from which the claim or cause of action is removed. Removal of the claim or cause of action is effected on such filing of a copy of the notice of removal. The parties shall proceed no

further in that court unless and until the claim or cause of action is remanded.

(d) Remand. A motion for remand of the removed claim or cause of action shall be governed by Rule 9014 and served on the parties to the removed claim or cause of action. (e) Procedure After Removal.

(1) After removal of a claim or cause of action to a district court the district court or, if the case under the Code has been referred to a bankruptcy judge of the district, the bankruptcy judge, may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the court from which the claim or cause of action was removed or otherwise.

(2) The district court or, if the case under the Code has been referred to a

bankruptcy judge of the district, the bankruptcy judge, may require the party filing the notice of removal to file with the clerk copies of all records and proceedings relating to the claim or cause of action in the court from which the claim or cause of action was removed. (3) Any party who has filed a pleading in connection with the removed claim or cause of action, other than the party filing the notice of removal, shall file a statement admitting or denying any allegation in the notice of removal that upon removal of the claim or cause of actio the proceeding is core or non-core.

If the statement alleges that the proceeding is non-core, it shall state that the party does or does not consent to entry of final orders or judgment by

the bankruptcy by the bankruptcy judge. A statement required by this paragraph shall be signed pursuant to Rule 9011 and shall be filed not later than 10 days after the filing of the notice of removal. Any party who files a statement pursuant to this paragraph shall mail a copy to every other party to the removed claim or cause of action. (f)Process After Pemoval. If one or more of the defendants has not been served with process, the service has not been perfected prior to removal, or the process served proves to be defective, such process or service may be completed or new process issued pursuant to Part VII of these rules. This subdivision shall not deprive any defendant on whom process is served after removal of the

defendant's right to move to remand the case. (g) Applicability of Part VII. The rules of Part VII apply to a claim or cause of action removed to a district court from a federal or state court and govern procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, the defendant shall answer or present the other defenses or objections available under the rules of Part VII within 20 days following the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief on which the action or proceeding is based, or within 20 days following the service of summons on such initial pleading, or within five days

following the filing of the notice of removal, whichever period is longest. (h) Record Supplied. When a party is entitled to copies of the records and proceedings in any civil action or proceeding in a federal or a state court, to be used in the removed civil action or proceeding, and the clerk of the federal or state court, on demand accompanied by payment or tender of the lawful fees, fails to deliver certified copies, the court may, on affidavit reciting the facts, direct such record to be supplied by affidavit or otherwise. Thereupon the proceedings, trial and judgment may be had in the court, and all process awarded, as if certified copies had been filed. (i) Attachment or sequestration; Securities. When a claim or cause of action is

removed to a district court, any attachment or sequestration of property in the court from which the claim or cause of action was removed shall hold the property to answer the final judgment or decree in the same manner as the property would have been held to answer final judgment or decree had it been rendered by the court from which the claim or cause of action was removed. All bonds, undertakings, or security, or security given by either party to the claim or cause of action prior to its removal shall remain valid and effectual notwithstanding such removal. All injunctions issued, orders entered and other proceedings had prior to removal shall remain in full force and effect until dissolved or modified by the court.

MINNESOTA LOCAL BANKRUPCTY RULE 201:

All bankruptcy cases and proceedings, including any claim or cause of action that is removed under 28 U.S.C. 1452 or that is removed under Bankruptcy Rule 9027, are referred to the bankruptcy judges and shall be assigned among them according to orders made by them.

Fed.R.Civ.P. 12 Defenses and Objections When and How Presented - by Pleading or Motion -- Motion for Judgment on the Pleadings

(a) When presented. A defendant shall serve an answer within 20 days after the service of the Summons and Complaint upon that Defendant . . .

Fed.R.Civ.P. 55 Default.

(a) Entry. When a party against whom a judgment for affirmative relief is

sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.

(b) Judgment. Judgment by default may be entered as follows:

(1) By the Clerk. When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and cost against the defendant, if the defendant has been defaulted for failure to appear and he is not an infant or an incompetent person.

Fed.R.Civ.P. 60 Relief from Judgment or Order.

(a) **Clerical Mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on a motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

IV. STATEMENT OF THE CASE

On February 18, 1992, petitioner N. Walter Goins filed a complaint in the United States District Court for the District of Minnesota against the

respondents herein asserting claims based on the Constitution and federal statutes. Petitioner's complaint was duly filed by the office of the clerk of the district court, Francis E. Dosal, assigned a court file number and issued a summons bearing the case number 4-92CV154(HHM).

Petitioner's complaint was for damages based on conduct petitioner alleged violated the federal Racketeering and Corrupt Influences Organization Act (RICO), federal antitrust statutes, and federal civil rights claims and securities law violations by respondents. Among the RICO predicates alleged by petitioner's complaint was violation of 18 U.S.C. 151, et seq. involving fraud in a title 11 (bankruptcy) case. Among the defendants named by petitioner was the

standing trustee of the bankrupt estate of KTMA.

On March 17, 1992, petitioner's counsel received acknowledgement of mail service from local counsel for respondents Syndicated Communications, Inc. and Broadcast Capital, Inc., also two of the named defendants in petitioner's district court complaint. The acknowledgments were sent in response to mail service of the summons (and complaint) issued by the United States District Court for the District of Minnesota.

On March 20, 1992, petitioner's counsel was served by counsel for respondent Donald R. Johnston with a notice of removal and answer of respondents Donald R. Johnston and Larry

B. Ricke. The notice of removal stated that respondents' counsel was causing the case filed in the federal district court in Minnesota District to be removed to the United States Bankruptcy Court for the District of Minnesota. The Notice of Removal was grounded on respondents' view that pursuant to Federal Bankruptcy Rule 9027, 28 U.S.C. 157, 1334, and 1452, as well as Minnesota Local Rule 201, a case originally filed in the United States District Court for the District of Minnesota was removable to its bankruptcy unit by the filing a notice of removal.

On April 6, 1992, respondents Syndicated Communications, Broadcast Capital, Inc., and their co-respondent Syncom Capital Corp. moved for dismissal of petitioner's claims against them based

on Federal Bankruptcy Rule 7012 and filed their motion to dismiss and supporting documents with the United States Bankruptcy Court for the District of Minnesota. Respondents Syndicated and Broadcast noticed a hearing on the dismissal motion before the Chief United States Bankruptcy Judge scheduled for hearing on May 1, 1992.

On April 9, 1992, petitioner, after an unsuccessful effort to schedule or "calendar" a hearing before the U.S. district judge originally assigned the case at time of filing, noticed a motion to strike all pleadings in the case referring to or bearing the caption of the bankruptcy matter which respondents claimed was the basis for removal of petitioner's complaint. Petitioner,

after serving the notice of motion and motion to strike the bankruptcy-related pleadings before the U.S. Magistrate Judge assigned to the case, received an order striking petitioner's motion date from the U.S. Magistrate Judge's calendar because, as the order recited, the case "had been removed to Bankruptcy Court." See Order of the Hon. Franklin L. Noel in Civ. No. 4-92-154 dated April 14, 1992.

From that order striking petitioner's hearing date, an appeal was timely taken to the district court judge originally assigned petitioner's case, the Honorable Harry H. MacLaughlin. While petitioner's appeal was pending before the district judge, the bankruptcy court nevertheless considered the motion to dismiss by respondents Syndicated,

Syncom, and Broadcast on May 1, 1992. Four of the respondents had objected to or noticed their non-consent to bankruptcy court final decisions based on Rule 9027(e). Petitioner filed a "Notice of Jurisdictional Objection" with the Bankruptcy Court prior to the hearing, arguing as he had to the district court, that no jurisdiction could obtain in the bankruptcy court over a case originally filed and brought in the district court, and that the filing of Federal Bankruptcy Rule 9027 "notice of removal" was ineffectual to remove a case from the district court for the District of Minnesota to its bankruptcy court. Petitioner also argued that to allow for such a removal of a case pending before an Article III judge to a non-Article III

judicial officer, a bankruptcy judge, would violate this Court's ruling in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), by removing the jurisdiction of an Article III court as to a private right matter from the only forum constitutionally authorized to exercise the judicial power of Article III of the Constitution.

Petitioner further argued that the plain words of the removal statute, 28 U.S.C. 1452, as revised in the post-Marathon context, foreclosed removal of a case within the district court itself. The bankruptcy judge, without ruling on petitioner's request that the bankruptcy court determine the removal to be a jurisdictional (and procedural)

nullity, nevertheless ruled that the bankruptcy court lacked jurisdiction to grant the respondents' motion to dismiss petitioner's claims because it lacked subject matter jurisdiction under 28 U.S.C. 1334. As a result, the bankruptcy court issued an order denying the respondents' motion to dismiss. On May 5, 1992, respondents Syndicated, Syncom, and Broadcast filed a second motion to dismiss--this time in the United States District Court for the District of Minnesota and noticing it for a hearing at time to be scheduled before the Honorable Harry H. MacLaughlin, district court judge. In response, petitioner filed a motion for default judgement, arguing that respondents Syndicated and Broadcast had made their first proper

defense in the district court some 45 days after their acknowledgement of service of the district court summons and complaint. Petitioner subsequently learned that the earlier appeal from the Magistrate's order regarding bankruptcy removal was affirmed by the district court, despite the fact that the bankruptcy court had ruled that it lacked subject matter jurisdiction pursuant to 28 U.S.C. 1334.

By an order and memorandum entered on May 8, 1992, the district court ruled the magistrate lacked jurisdiction to rule on petitioner's motion because the case had been properly removed to bankruptcy court by virtue of either the automatic reference provisions of the Minnesota Local Bankruptcy Rule 201, or

removed by virtue of Rule 9027, 28 U.S.C. 1452 and their concomitant provisions 28 U.S.C. 157 and 1334. Subsequently, the bankruptcy court held a hearing on all of the parties motions to remand the case to district court. While these motions were pending, the district court on May 26, 1992 sua sponte denied the petitioner's motion for default judgement. It did not rule upon or refer to the pending motion to dismiss filed by respondents Syndicated, Broadcast, and Syncom. In its May 26, 1992 Memorandum and Order, the district court repeated its earlier ruling that the March 20, 1992 Notice of Removal pursuant to 28 U.S.C. 157, 1334, 1452 and Federal Bankruptcy Rule 9027, as well as local rule 201 caused petitioner's cause to be removed to the

bankruptcy court. See Memorandum and Order dated May 26, 1992 attached as Appendix VI.

Petitioner timely appealed the order of the district court on June 12, 1992 to the United States Court of Appeals for the Eighth Circuit. Prior to the Court of Appeals setting a briefing schedule (and before notice of the docketing of the appeal), respondents Syndicated, Syncom, and Broadcast filed a motion to dismiss the appeal in the Court of Appeals based on their position that the court of appeals lacked jurisdiction to decide petitioners' appeal prior to final judgement in the district court. Respondents asserted that the order denying default judgement by the district court was only reviewable under 28 U.S.C.

1291 after final judgement, and that such an order was likewise not appealable as a "final order" under this Court's line of decisions beginning with cases such as Cohen v. Beneficial Loan Corp. 337 U.S. 541 (1948) and including Coopers & Lybrand v. Livesay, 437 U.S. 463, 98 S. Ct. 2454 (1978). Before the date for petitioner to respond to the motion to dismiss in the court of appeals, the court below dismissed petitioner's appeal and granted respondents' motion by finding that it lacked jurisdiction over the appeal. See Judgment dated July 17, 1992 of the United States Court of Appeals for the Eighth Circuit attached as Appendix I.

Petitioner, after obtaining an extension of time to petition for

rehearing, timely filed a petition for rehearing to the court of appeals on August 13, 1992. The court of appeals denied petitioner's request for rehearing on September 1, 1992. See Orders dated July 27, 1992 and September 1, 1992 in Appendices I and IX.

On October 10, 1992, the district court, by Memorandum Order, dismissed the complaint and ordered entry of summary judgment in favor of Defendants.

This Court denied the petition for a writ of certiorari to the Eighth Circuit United States Court of Appeals as to the non-final (prior to final judgment) denial of default judgment on January 19, 1993 in Goins v. Lang, et al., in No. 92-951, ____U.S.____, 113 Sup.Ct.1066 (1993). See Maryland v. Baltimore Radio Show, 338

U.S. 912 (1950) (Frankfurter,J.).

Petitioner appealed the district court's order after final judgment in to the Eighth Circuit Court of Appeals, contending inter alia that the district court docket incorrectly omitted the petitioner's April 08, 1992 filing of an Affidavit of Damages and request for entry of default judgment to the clerk of the district court. At oral argument, Petitioner' counsel informed the panel that the affidavit filed on April 8, 1992 was missing from the district court docket, and that in addition to the matters raised on appeal regarding the impropriety of the removal of the case to the bankruptcy court, the omission of the clerk to reflect the filing in the docket and to enter judgment for petitioner,

required the court of appeals to take steps to correct the district court docket. (Petitioner's counsel also pointed out in his oral argument that counsel retained a stamped file copy of the April 8, 1992 submission for his records bearing the stamp of the Clerk of the United States District Court for the District of Minnesota in Minneapolis, MN as date stamped April 8, 1992.).

The court of appeals, in a short per curiam opinion, affirmed the order and judgment of the trial court granting summary judgment as all defendants, including respondents Syndicated Communications, et al.; see per curiam opinion on June 25, 1993; and denied petitioner's Petition For Rehearing to the panel on August 6, 1993.

Petitioner now seeks this Court's review after final judgment of the decision of the Court of Appeals affirming the district court order, including its order denying petitioner judgment by default, and inter alia, the failure of the Court of Appeals to order a correction of the trial court docket below, in light of the evident omission therein with regard to certain filings made in the district court by Petitioner with regard to his request for default judgment against Respondents Syndicated Communications, et al.

This petition seeks to have this Court exercise its supervisory powers over the lower federal courts and to determine if it has sanctioned the lower court in departing from proper and

accepted judicial procedures in allowing a case originally filed in the district court to be removed to its bankruptcy court, and more particularly seeks to have this Court review the integrity of the proceedings in the court below given its failure to correct the docket in light of the obvious omissions in the district court.

VI. JURISDICTIONAL BASIS IN THE COURT BELOW

The United States Court of Appeals for the Eighth Circuit had jurisdiction to review the order of the United States District Court for the District of Minnesota based on section 1291 of Title 28, U.S.C. The United States District Court for the District of Minnesota had jurisdiction over petitioner's case based

on section 1331 of Title 28, U.S.C.

VII. REASON FOR GRANTING THE WRIT

A. THE COURT SHOULD GRANT THE WRIT TO DETERMINE IF THE COURT OF APPEALS AND THE DISTRICT COURT BELOW HAVE FAILED TO ASSURE THE INTEGRETRITY OF THE JUDICIAL PROCEEDINGS.

The Court should grant the writ to determine if the court of appeals and the district court below have failed to assure the integrity of their own proceedings, particularly in light of record evidence and showings of the district court docket respecting petitioner's request for default judgment in the district court, notwithstanding the improper attempt to remove the case originally filed in the district court to the bankruptcy court. Petitioner argued in his interlocutory petition to this Court that in the light of the

post-Marathon revisions of the bankruptcy jurisdiction of the federal courts has created a jurisdictional cul-de-sac, allowing Article III district courts to abdicate the judicial power under the Constitution in favor of courts not exercising the judicial power of Article III Courts. See Goins v. Lang, et al., ____U.S.____, 113 S.Ct. 1066(1993), denying pet. for certiorari. Petitioner, while maintaining that such removals are improper and cannot remove matters properly in the district court to the bankruptcy courts, submits that the simple issue now sought to be reviewed is whether a party may avoid answering in the district court which has jurisdiction over the case; avoid a default judgment; then be permitted to "refile" in the

district court after the bankruptcy court rules it lacked jurisdiction; and, never face the need to seek to vacate an entry of default or default judgment filed prior to the closing of the district court docket "removing" the case to bankruptcy court, because (apparently) a document filed with the district court is omitted from or removed from its docket. This is the most elemental denial of procedural due process, if a party in a federal court proceeding cannot depend upon the accuracy and integrity of federal court records--and, if the federal appellate courts refuse to correct the error when confronted with it.

The result of this obscuring of the record and files was the creation of an

opportunity for the Respondents Syndicated, Syncom, and Broadcap, to submit their responsive motion in both the district court and the bankruptcy without any consequences as to their failure to timely and properly file in the district court. Essentially, by participating in the improper removal, and because the Respondents Syndicated, et al. faced no consequences for doing so, they were able to choose when to answer the federal district court summons and complaint, to avoid an appeal of the denial of their motion to dismiss in the Bankruptcy Court, and, because of the failure or refusal of the district court clerk to record the default pleadings--they faced no obstacle to refiling in the district court when they realized "the

court which had jurisdiction".

This is neither a complex matter nor a frivolous one. This petition goes to whether there is any integrity in the Federal Rules, the records of proceedings in the courts below, and therefore, the integrity of the judicial process as being one which is worthy of respectful participation. If it would serve this Court's consideration of the petition, Petitioner could summarize the arguments and authority for the impropriety of infra-district court removals, but Petitioner respectfully submits that the vagaries attending the proceedings in the court below perhaps make that argument more strongly than all the authorities listed in Petitioner's previous interlocutory submission to this Court

seeking review.

This Court should grant certiorari for all of those reasons, but primarily because the failure to assure a fair procedure brings into doubt the results--and thereby denies justice to all.

B. THIS CASE RAISES ISSUES RELATING TO THIS COURT'S PREVIOUS DECISION NORTHERN PIPE LINE CONSTRUCTION CO. v. MARATHON

In addition, Petitioner restates that in addition to the serious concerns raised as to procedural integrity, this Court should review what are the apparent constitutional concerns now evident in this case. This Court in Marathon seemingly sought to resolve the problems which are lurking in the new statutory jurisdictional scheme of 28 U.S.C. 157, 1334, and 1452; however the

constitutional pitfalls of Marathon persist in the new statutory scheme, if they indeed provide for and allow Article III courts to lose or abandon their jurisdictional prerogatives, as distinct to their being unrecognized in the first instance. See Marathon and Granfinanciera, S.A. v. Nordberg, 109 Sup. Ct. 2782 (1989) supra.

This Court should also settle an issue regarding the procedural and jurisdictional requirements of the Bankruptcy Amendments and Federal Judgeship Act of 1984 in order to resolve them clearly for the guidance of the lower federal courts. The issue of the removability of cases originally filed in the federal district courts is one that has led to a range of decisions--and, in

fact was predicted to lead to divergent and unsettled outcomes immediately after the passage of the Bankruptcy Amendment and Federal Judgeship Act of 1984. See Gibson, "Removal of Claims Related to Bankruptcy Cases: What Is a 'Claim or Cause of Action?'" 34 UCLA LAW REVIEW 1 (1986); King, "Jurisdiction and Procedure Under the Bankruptcy Amendments of 1984", 38 VAND. L. REV. 675 (1985).

Further, the circuits have not dealt with the issue of the propriety and availability of removal of district court cases, petitioner suspects, in part, because of the unreviewability of decisions regarding remand as provided in 28 U.S.C. 1452(b).

Another plausible reason for the absence of any guidance as to the

availability of the removal provision of 28 U.S.C. 1452 with respect to cases originally filed in the federal district court, is the recent self-restraint exercised by many of the federal bankruptcy courts which have faced the issue whether squarely or indirectly. (The bankruptcy court for the Eastern District of Pennsylvania in In Re New York City Shoes, Inc., 1989 WL 112792 (Bankr.E.D.Pa.) stated:

> **"Furthermore, the 'competing' litigation is pending in the district court, the very court of which this court is a unit. The district court has the power to withdraw reference of bankruptcy cases and proceedings from us to itself as it sees fit. 28 U.S.C. 157(d). It is very doubtful that we have the power to withdraw cases to this court from the district court. See Thomas Steel Corp. v. Bethlehem Rebar Industries, Inc., 101**

B.R. 16 (Bankr. N.D.Ill.1989); and Helena Chemical Co. v. Manley, 47 B.R. 72, 74-75 (Bankr.N.D.Miss.1985). Our hearing (47) and deciding this claim, which is paralleled by the case before Chief Judge Fullam in the district court, would be effectively, removing a case already submitted to the district court to this court. Such a supervening jurisdictional event would take on constitutional dimensions. See Granfinanciera v. Nordberg, 109 S.Ct. 2782, 2794-97 (1989); and Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 73-76.").

The bankruptcy courts and, when the issue has reached them, the district courts have taken two divergent positions regarding the removal of cases originally filed in the district court. And, in arriving at the two divergent positions, the lower courts have set forth variations of two major themes emanating

from the dictates of Marathon and its progeny.

1. THE "REMOVAL AVAILABLE" POSITION

Immediately after the revision of the bankruptcy jurisdiction enacted by the Congress, the bankruptcy courts and district courts recognized the critical change enacted by 28 U.S.C. 1452 which replaced the court to which a case is removed from "bankruptcy court" to "district court." Nevertheless, in Philadelphia Gold, 56 B.R. 87 (Bkrtcy.E.D.Pa. 1985), the Bankruptcy Court for Eastern District of Pennsylvania held that legislative enactment of 28 U.S.C. 1452 and its use of the term "district court" as the destination of removed claim or cause of action did not preclude a case originally

brought in the district court from being subject to removal by virtue of the provisions of 28 U.S.C. 1452. Moreover, that bankruptcy court found no constitutional shoals lying in the path of such an infra-district court removal. See also Raff v. Gordon, 58 B.R. 988 (E.D.Pa.1986); cf. In Re Chapman, 132 B.R. 153 (Bkrtcy.N.D.Ill.1991).

2. THE "NON REMOVAL" POSITION

The major case after Philadelphia Gold to hold that infra-district court removal under 28 U.S.C. 1452 is not available as to cases originally filed in the district courts is Thomas Steel v. Bethlehem Rebar Industries, Inc., 101 B.R. 16 (Bkrtcy.N.D.Ill. 1989). In Thomas Steel, the Bankruptcy Court for the Northern District of Illinois,

held that such infra-district court removals were not available in the post-Marathon environment in light of the Congressional enactment of 28 U.S.C. 1452 and the language therein providing for removal of cases to the "district court", as opposed to the pre-Marathon provisions of 28 U.S.C. 1478 which provided for removal to the "bankruptcy court".

The most definitive statement found by petitioner with respect to the removability of cases filed originally in the federal district courts is stated in Centrust Savings Bank v. Love, 131 B.R. 64 (S.D.Tex.1991). See also In Re Croley, 121 B.R. 412 (Bkrtcy.D.C. 1990); In Re City-Wide Press, Inc., 107 B.R.68 (Bkrtcy.E.D.Pa. 1989); Helena Chemical Co. v. Manley, 47 B.R. 72 (Bkrtcy. 1985);

In Re New York City Shoes, Inc., 1989 WL 112792 (Bankr.E.D.Pa.); In Re Long, 43 B.R. 692 (Bkrtcy. 1984); In Re Watson-Mahaney, Inc., 70 B.R. 578 (Bkrtcy.N.D.Ill. 1987). Compare In Re Northwest Cinema Corp., 49 B.R. 479 (Bkrtcy. 1985); In Re Gianakas, 56 B.R. 747 (N.D. Ill. 1985); In Re Hanson Industries, Inc., 83 B.R. 659 (Bkrtcy.D.Minn. 1988).

C. THIS COURT SHOULD GRANT THE WRIT BECAUSE THIS CASE RAISES THE ISSUE OF WHETHER THE LOWER FEDERAL COURTS HAVE DEPARTED FROM ACCEPTED JUDICIAL PRACTICE IN MISINTERPRETING THE PLAIN MEANING OF SECTION 1452, TITLE 28 U.S.C.

The plain meaning of the language of 28 U.S.C. 1452 indicates that the court below has departed from accepted judicial practice as to interpretation of statutes.

In light of the clear Congressional recognition of the infirmities of the pre-1984 bankruptcy jurisdiction as invalidated by the Marathon decision, it seems highly unlikely that the Congress did not have a clear purpose or intention in substituting the words "district court~ for the words "bankruptcy court" in the recast removal statute now codified as 28 U.S.C. 1452. Therefore, the role of the courts in interpreting the statute and its meaning should be elemental. See Cardozo, THE NATURE OF THE JUDICIAL PR®CESS (Yale Univ. Press, 1921) at pp. 14-15.

The relevant statutes defining the words "district court" and "district court of the United States" as set forth in Title 28 of the United States Code

make this process of interpretation luminously clear. 28 U.S.C. 451, the definitional section of Chapter 21 of the Judicial Code states: "The terms 'district court' and 'district court of the United States' mean the courts constituted by chapter 5 of this title." Chapter 5 of title 28 U.S.C. is specifically titled "District Courts"; Chapter 6 of title 28 U.S C. is titled "Bankruptcy Judges" and includes §§ 151-158 of title 28 as codified in the wake of the revisions commonly known as the Bankruptcy Amendments and Federal Judgeship Act, Pub. L. 98-353. Therefore, clearly, by definition, the Congress could not have intended the courts as constituted under Chapter 6 of title 28 to constitute "district courts" for the

purposes of 28 U.S.C. 1452. To do so, moreover, would have negated the stated reason for Congress undertaking its seemingly painstaking revision of the jurisdictional structure of bankruptcy courts in the wake of the decision by this Court in Marathon, supra. And while the relevant portion of 28 U.S.C. § 151 states that bankruptcy judges constitute a "unit of the district court", it does not follow from that that any of the judges as constituted by Chapter 6 of title 28 actually constitute a separate district court to which removal might lie under the authority of 28 U.S.C. 1452.

VIII. CONCLUSION

This Court should therefore grant this petition for writ of certiorari because it falls squarely within the

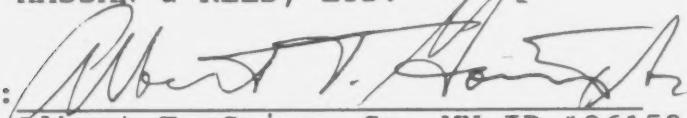
criteria of Supreme Court Rule 10 dealing with considerations governing review on writ of certiorari: 1) The decision of the lower federal courts appears to sanction a departure from accepted and usual course of judicial proceedings by permitting a case lodged originally in the United States District Court to be removed from its jurisdiction to its bankruptcy unit, albeit the bankruptcy court lacked subject matter jurisdiction over the matters brought to it; or, in the alternative the matter remains to be settled by this Court in light of the post-Marathon, Bankruptcy Jurisdiction Act, and, 2) this Court is required to exercise its supervisory power to assure or oversee the integrity of the lower federal courts in the fair and impartial

administration of justice pursuant to the rule of law.

For all the foregoing reasons, petitioner submits respectfully that a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

Respectfully submitted,

HASSAN & REED, LTD.

By:  11/3/93

Albert T. Goins, Sr.,MN-ID 126159
U.S. Supreme Court No: 199225
2311 Wayzata Boulevard
Minneapolis, MN 55405
(612) 374-5858

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
No. 92-2542MNMI

N. Walter Goins,
Appellant, Appeal from the United States District Court for the District of Minnesota

vs.

Dale W. Lang; Ronald R Jensen; Halcomm, Inc., a Minnesota corporation; KX Acquisition Limited Partnership, a Minnesota limited partnership, and their officers and directors, and the signatories, lenders and participants in a November 30, 1988 Letter Agreement of Halcomm; KTMA Acquisition Corp., a New York corporation; Red River Broadcast Corp., a Minnesota corporation, including Syndicated Communications, Inc. of Washington, D.C. and its subsidiary, Syncom Capital Corp.; Broadcast Capital, Incorporated, a Virginia corporation; Donald R. Johnston; Larry B. Ricke; Thomas J. Lallier,

Appellees.

JUDGMENT

Appellees' motion to dismiss the appeal has been considered by the court and is granted. It is hereby ordered that this appeal be dismissed for lack of jurisdiction.

July 17, 1992

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

N. Walter Goins, Civil 4-92-154

Plaintiff,

v. ORDER

Dale W. Lang, Ronald R. Jensen, Halcomm, Inc., KX Acquisition Limited Partnership, KTMA Acquisition Corp., Red River Broadcast Corp., Broadcast Capital, Donald R. Johnston, Larry B. Ricke, Thomas J. Lallier,

Defendants.

Because this case has been removed to Bankruptcy Court, IT IS HEREBY ORDERED that plaintiff's motion "to strike a

pleading" scheduled by plaintiff's counsel for May 18, 1992, at 11:00 a.m. before the undersigned United States Magistrate Judge is stricken from the calendar.

Dated: April 14, 1992.

FRANKLIN L. NOEL
United States Magistrate Judge

FILED Apr 15 1992
Francis E. Dosal, Clerk
Judgement Entered
Deputy Clerk's Initials _

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:
KTMA Acquisition Corp.,
d/b/a KTMA TV 23,
Debtor. BKRY NO.4-89-3530

N. Walter Goins, ADV. 4-92-85

Plaintiff,

v. ORDER DENYING MOTION TO DISMISS

Dale W. Lang, Ronald R. Jensen, Halcomm, Inc., a Minnesota corporation, KX Acquisition Limited Partnership, a Minnesota limited partnership, and their officers and directors, and the signatories, lenders and participants in a November 30, 1988 Letter Agreement of Halcomm, KTMA Acquisition Corp., a New York corporation, and Red River Broadcast Corp., a Minnesota corporation, including Syndicated Communications, Inc., of Washington, D.C. and its subsidiary, Syncom Capital Corp., and Broadcast Capital Incorporated, a Virginia corporation, and Donald R. Johnston, Larry B. Ricke and Thomas J. Lallier,
Defendants.

At Minneapolis, Minnesota, May 4, 1992.

This proceeding came on for hearing on the motion of defendants Syndicated Communications, Inc., Syncom Capital Corp., and Broadcast Capital Inc. for dismissal of the plaintiff's complaint against them. Michael Berens appeared on behalf of the moving defendants; Jan Stuurmans appeared on behalf of defendants KTMA Acquisition Corporation, Donald R. Johnston, and Larry B. Ricke; Albert Turner Goins appeared on behalf of the plaintiff.

For reasons stated orally and recorded in open court and based on the conclusion that the court lacks subject matter jurisdiction over the plaintiff's claims against the moving defendants,

IT IS ORDERED: The motion of

defendants Syndicated Communications, Inc., Syncom Capital Corp., and Broadcast Capital Inc. for dismissal of the plaintiff's complaint against them is denied.

ROBERT J. KRESSEL

CHIEF UNITED STATES BANKRUPTCY JUDGE

NOTICE OF ENTRY AND FILING OF JUDGMENT Filed and Docket Entry made on May 04 1992 Patrick G. De Wane, Clerk, By lmh.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

N. Walter Goins,
Plaintiff,
v.

Civil 4-92-154
MEMORANDUM AND ORDER

Dale W. Lang, Ronald R. Jensen, Halcomm, Inc., a Minnesota corporation, KX Acquisition Limited Partnership, a Minnesota limited partnership and their officers and directors, and the signatories, lenders and participants in a November 30, 1988 letter agreement of Alcomm; KTMA Acquisition Corp., a New York corporation; Red River Broadcast Corp., a Minnesota corporation, including Syndicated Communications, Inc. of Washington, D.C. and its subsidiary, Syncom Capital Corp.; Broadcast Capital Incorporated, a Virginia corporation; Donald R. Johnston, Larry B. Ricke, and Thomas J. Lallier,
Defendants.

- -

Albert T. Goins, Goins Law Office, 1729 East County Road D, Maplewood, MN 55109, for Plaintiff.

Richard Ihrig, Mark A. Jacobson, Lindquist & Vennum, 4200 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402, for defendants Dale W. Lang, Ronald R. Jensen, Halcomm, Inc. and KX Acquisition Limited Partnership.

Michael Berens, Kelly & Berens, 3720 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402, for defendant Broadcast Capital Incorporated.

This matter is before the Court on plaintiff's appeal from the Magistrate Judge's order of April 14, 1992 striking plaintiff's motion to strike a pleading from the calendar.

Defendant KTMA Acquisition Corporation (KTMA) is the debtor in a Chapter 11 proceeding pending since 1989 in the United States Bankruptcy Court for the District of Minnesota. On February 18, 1992, plaintiff commenced this civil action, asserting claims against KTMA, the trustee in bankruptcy, and the trustee's attorney. On March 20, 1992, these three defendants filed a notice of removal pursuant to 28 U.S.C. 1452(a),

Bankr. R. 9027, and Local Bankr. R. 201. On April 9, 1992, plaintiff scheduled a "motion to strike pursuant to Rule 12" before the Magistrate Judge. On April 14, 1992, before the hearing, the Magistrate Judge struck plaintiff's motion from the calendar on the grounds that this action had been removed to bankruptcy court. Plaintiff appeals this April 14, 1992 order.

The Court, after careful review of all of the briefs submitted by the parties, finds that this action is properly before the bankruptcy court pursuant to either the automatic reference provisions of Local Rule 201, as authorized by 28 U.S.C. 157(a) & 1334, or the filing of defendants' notice

of removal under Bankr. R. 9027, see Raff v. Gordon, 58 B.R. 988, 990 (E.D.Pa. 1986); Philadelphia Gold Corp. v. Fauzio (In re Philadelphia Gold Corp.), 56 B.R. 87, 89-90 (Bankr. E.D.Pa. 1985); 1 Collier on Bankruptcy ¶ 3.01, at 3-92 n.153c (15th ed. 1991). The Magistrate Judge therefore properly found that he lacked jurisdiction to address the merits of plaintiff's grievances.

Accordingly, based upon review of all the files, records, and proceedings, and it appearing to the Court that the order of the Magistrate Judge is not clearly erroneous nor contrary to law, pursuant to 28 U.S.C. 636(b)(1)(A) and Local Rule 72.1,

IT IS ORDERED that the April 14, 1992 Order of the United States Magistrate Judge is affirmed.

Judge Harry H. MacLaughlin

United States District Court

DATED: May 6, 1992

Filed May 08 1992

Francis E. Dosal, Clerk

Judgement entered

Deputy Clerk's Initials

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

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re: Bky. No. 4-89-3530-RJK

KTMA Acquisition Corp. d/b/a
KTMA TV 23,
Debtor, Adv. No. 4-92-4085

N. Walter Goins,
Plaintiff,

v.

Dale W. Lang, Ronald R. Jensen, Halcomm, Inc., a Minnesota corporation, KX Acquisition Limited Partnership, a Minnesota limited partnership, and their officers and directors, and the ORDER signatories, lenders and participants in a November 30, 1988 Letter Agreement of Halcomm, KTMA Acquisition Corp., a New York corporation, and Red River Broadcast Corp., a Minnesota corporation, including Syndicated Communications, Inc., of Washington, D.C. and its subsidiary, Syncom Capital Corp., and Broadcast Capital Incorporated, a Virginia corporation, and Donald R. Johnston, Larry B. Ricke and Thomas J. Lallier,

Defendants.

At Minneapolis, Minnesota, May 13 , 1992.

This proceeding came before the court on the ex parte request of Syndicated Communications, Inc., Syncom Capital Corp., and Broadcast Capital Inc. pursuant to Bankruptcy Rule 9006(b) to enlarge the time within which they must serve their responsive pleading to plaintiffs complaint against them until such time as those parties' pending motion to enlarge time may be heard and considered by the court.

Based upon a showing of good cause, IT IS ORDERED:

The time within which defendants Syndicated Communications, Inc., Syncom Capital Corp., and Broadcast Capital Inc. shall serve their responsive pleading to plaintiff's complaint is enlarged to and

including May 29, 1992, or until the court issues its order in response to the pending motion of these parties to enlarge time.

Robert J. Kressel
Chief United States
Bankruptcy Judge

NOTICE OF ENTRY AND FILING ORDER OR JUDGMENT

Filed and Docket Entry made on May 14, 1992

Patrick G. De Wane, Clerk, By lmh

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

N. Walter Goins,

Plaintiff,

v.

CIVIL 4-92-154
ORDER

Dale W. Lang, Ronald R. Jensen, Halcomm, Inc., a Minnesota corporation, KX Acquisition Limited Partnership, a Minnesota limited partnership and their officers and directors, and the signatories, lenders and participants in a November 30, 1988 letter agreement of Alcomm; KTMA Acquisition Corp., a New York corporation; Red River Broadcast Corp., a Minnesota corporation, including Syndicated Communications, Inc. of Washington, D.C. and its subsidiary, Syncom Capital Corp.; Broadcast Capital Incorporated, a Virginia corporation; Donald R. Johnston, Larry B. Ricke, and Thomas J. Lallier,

Defendants.

Albert T. Goins, Goins Law Office, 1729 East County Road D, Maplewood, MN 55109, for plaintiff.

Richard Ihrig, Mark A. Jacobson, Lindquist & Vennum, 4200 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402, for defendants Dale W. Lang, Ronald R. Jensen, Halcomm, Inc. and RX Acquisition Limited PartnershiP.

FILED MAY 26 1992
FRANCIS E. DOSAL CLERK
JUDGMENT ENTERED _____
DEPUTY CLERK'S INITIALS _____

Michael Berens, Kelly & Berens, 3720 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402, for defendant Broadcast Capital Incorporated.

This matter is before the Court on plaintiff's motion for entry of default judgment. However, this Court has already held that this action is properly before the bankruptcy court under either the automatic reference provisions of Local Rule 201, as authorized by 28 U.S.C.

157(a) & 1334, or the filing of defendants' notice of removal under Bankr. R. 9027, see Raff v. Gordon, 58 B.R. 988, 990, (E.D.Pa. 1986); Philadelphia Gold Corp. v. Fauzio (In re Philadelphia Gold Corp.), 56 B.R. 87, 88-90 (Bankr. E.D.Pa. 1985); 1 Collier on Bankruptcy ¶ 3.01, at 3-92 n. 153c (15th ed. 1991). Plaintiff's motion will therefore be denied.

IT IS ORDERED that plaintiff's motion for entry of default judgment is denied.

Judge Harry H. MacLaughlin
United States District Court

DATED: May 26, 1992

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

KTMA ACQUISITION CORP., d/b/a KTMA TV 23, Debtor,

TRANSMITTAL OF REMANDED ADVERSARY PROCEEDING

PAPERS TO CLERK OF DISTRICT COURT

No.CIV 4-92-154
No.BKY 4-89-3530
No.ADV 4-92-85-RJK

N. WALTER GOINS,

Plaintiff,

DALE W. LANG, RONALD R. JENSEN, HALCOMM, INC., a Minnesota corporation, KX ACQUISITION LIMITED PARTNERSHIP, a Minnesota limited partnership, and THEIR OFFICERS AND DIRECTORS, AND THE SIGNATORIES, LENDERS AND PARTICIPANTS IN A NOVEMBER 30, 1988 LETTER AGREEMENT OF HALCOMM, KTMA ACQUISITION CORP., A New York corporation, and RED RIVER BROADCAST CORP., a Minnesota corporation, including SYNDICATED COMMUNICATIONS, INC., OF WASHINGTON, D.C. AND ITS SUBSIDIARY, SYNCOM CAPITAL CORP., and BROADCAST CAPITAL INCORPORATED, a Virginia corporation, and DONALD R. JOHNSTON, LARRY B. RICKE and THOMAS J. LALLIER,

Defendants.

To: Clerk of District Court.

By order of remand dated May 29, 1992, filed and docket entry made on June 1, 1992, of Chief U.S. Bankruptcy Judge Robert J. Kressel, this adversary proceeding has been remanded to the district court under Rule 9027(d) F.R.Bkr. P. Your original civil action file, a certified copy of our docket, and copies of all papers filed in the bankruptcy court after removal to the bankruptcy court, which copies are hereby certified to be true copies of the originals on file in this office, are enclosed.

Dated: June 9, 1992. PATRICK G. DE WANE
Clerk of Bankruptcy Court

cc: Counsel or parties and
United States Trustee By Shelia Jones
Deputy Clerk

060992

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No.92-2542MNMI

N. Walter Goins,
Appellant,

Appeal from the United States District Court for the District of Minnesota

vs.

Dale W. Lang, et al.,
Appellees.

The motion of appellant N. Walter Goins for an extension of time until August 14, 1992, to file a petition for rehearing is granted.

July 27, 1992

Order Entered Under Rule 27B(a):

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No.92-2542MNMI

N.Walter Goins,

Appellant,

vs.

Dale W. Lang, et al., Appellees.

Appeal from the United States District Court for the District of Minnesota

The petition for rehearing by the panel is denied.

September 1, 1992

Order Entered at the Direction of the Court:

Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

N. Walter Goins,

Plaintiff,

v.

CIVIL 4-92-154
MEMORANDUM AND ORDER

Dale W. Lang; Ronald R. Jensen; Halcomm, Inc., a Minnesota corporation; KX Acquisition Limited Partnership, a Minnesota limited partnership, and their officers and directors, and the signatories, lenders and participants in a November 30, 1988 Letter Agreement of Halcomm; KTMA Acquisition Corp., a New York corporation; Red River Broadcast Corp., a Minnesota corporation, including Syndicated Communications, Inc. of Washington, D.C. and its subsidiary, Syncom Capital Corp.; Broadcast Capital Incorporated, a Virginia corporation; Donald R. Johnston; Larry B. Ricke; and Thomas J. Lallier,

Defendants.

Albert T. Goins, Sr., Goins Law Office, 1729 East County Road D, Maplewood, MN 55109, for plaintiff.

Richard Ihrig, Mark A. Jacobson, Lindquist & Vennum, 4200 IDS Center, 80

South Eighth Street, Minneapolis, MN 55401, for defendants Dale W. Lang, Ronald R. Jensen, Halcomm Inc., and KX Acquisition Limited Partnership.

Jan D. Stuurmans, 600 Title Insurance Building, 400 Second Avenue South, Minneapolis, MN 55401, for defendants KTMA Acquisition Corp., Donald R. Johnston, and Larry B. Ricke.

Michael Berens, Carol E. Baker, Kelly & Berens, 3720 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402, for defendants Red River Broadcast Corp. and Broadcast Capital Incorporated.

Thomas J. Lallier, Michael C. Glover, Anthony C. Branch, Mackall, Crounse & Moore, 1600 TCF Tower, 121 South Eighth Street, Minneapolis, MN 55402, for defendant Thomas J. Lallier.

This matter is before the Court on defendants' motions to dismiss and motions for summary judgment. These motions will be granted.

FACTS

From 1982 to 1987, the plaintiff, N. Walter Goins, was president and the sole shareholder of L.E.O. Broadcasting, Inc. (LEO), a Minnesota corporation which owned and operated Stations KXLI-TV (Channel 41) and KXLT-TV (Channel 47). Between 1982 and 1985, defendant Syncom Capital Corp. (Syncom), a subsidiary of Syndicated Communications, Inc., and defendant Broadcast Capital Corp. (Broadcast) made various loans to LEO.[1] Goins personally guaranteed these loans and he now claims that Syncom and Broadcast charged LEO usurious interest rates. In May 1987, Syncom and Broadcast

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[1] Syncom and Broadcast are Small Business Investment Companies (SBICs), limited by law to making loans to minority-owned and controlled companies. Plaintiff is a minority race individual.

sold the LEO notes to Dale W. Lang and received a promissory note of Halcomm, Inc., a company in which Lang is the majority shareholder. Syncom and Broadcast maintain that their involvement with the plaintiff ended at that time.

In 1987, Goins sold LEO to Halcomm in exchange for 110,000 shares of stock, which represented a twelve percent ownership intereSt. Lang, in addition to being Halcomm's controlling shareholder, also was Halcomm's largest creditor and he had obtained mortgages and security interests in substantially all of Halcomm's assets.

On November 18, 1988, Halcomm informed its shareholders that it was considering a transaction involving the sale or disposition of all or

substantially all of the corporation's assets. See Affidavit of Ronald R. Jensen, Exh. A. Halcomm planned to sell its assets to a corporation to be formed with two other broadcasters, defendant KTMA Acquisition Corp. (KTMA) and defendant Red River Broadcast Corp. (Red River). Halcomm scheduled a shareholder meeting for December 8, 1988 to obtain approval for the transaction.

Between the time the shareholders received notice of the transaction and the shareholder meeting to approve the transaction, representatives of KTMA, Red River, and Halcomm entered into a "binding" Letter Agreement in which the parties formally agreed to form a new corporation which would assume the assets and liabilities of Halcomm, KTMA, and Red

River. Affidavit of Richard A. Primuth, Exh. A. The parties signed this Letter Agreement on November 30, 1988. However, the agreement explicitly required the approval of the shareholders of KTMA, Red River, Halcomm, and their respective lenders.[2]

On December 5, 1988, Goins gave Halcomm written notice of his dissent from the sale of assets and of his intent to demand the fair value of his shares as was his right under Minnesota law. Statement of N. Walter Goins, ¶ 12. Halcomm's shareholders approved the

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[2] The agreement read: "The obligations of the parties hereto are subject to the prior consent and approval of the shareholders of KAC [KTMA], Halcomm and RRBC [Red River] and their respective lenders." Primuth Aff., Ex. A ¶ 1.

transaction at the shareholders meeting on December 8, 1988. Plaintiff contends that the Letter Agreement was kept secret from him and the FCC prior to the vote, Walter Goins' Statement, ¶ 12, but the minutes of the meeting and the resolution specifically refer to the Letter Agreement. Primuth Aff., Exh. B at 2. Plaintiff asserts that Halcomm's officer Ronald R. Jensen never informed him of the Letter Agreement despite plaintiff's attempts to discover the nature of the transaction. He implies that he was aware of the deal in general, to which he formally objected, but that the defendants concealed the details from him and that concealment contributed to his damages. The formation of new corporation never occurred, however, because neither

KTMA nor Red River were able to obtain the required financing. The parties then agreed to abandon the transaction. Jensen Aff. ¶ 4.

On December 30, 1989 Lang, as Halcomm's largest creditor and majority shareholder, seized Halcomm's assets and sold them at public auction. That action rendered Goins' minority stock interest in Halcomm worthless and is the primary reason for this lawsuit. Lang purchased the assets himself at the auction for $5 million. There remained a deficiency of $4.5 million. Lang then entered into an agreement to satisfy the sale deficiency through Lang's receipt of certain real estate of Halcomm and Halcomm's broadcast licenses. Later, Lang apparently allowed KTMA to temporarily use some or those

assets, including furniture and some programming.

On July 28, 1989, KTMA filed for relief under Chapter 11 of the Bankruptcy Code. KTMA operated as a debtor-in-possession until August 1991, when defendant Donald R. Johnston was appointed Chapter 11 operating trustee. Defendant Larry B. Ricke was employed to serve as attorney to the trustee. Goins filed a proof of claim based on the Letter Agreement. His theory was that KTMA had a contract with Halcomm to merge and because he was dissenting Halcomm shareholder, he had a right to demand payment for those shares from KTMA. Goins filed his claim after learning of the planned sale of KTMA assets to Sonlight Television. Johnston investigated the

Letter Agreement and concluded that the parties had abandoned it. On January 3, 1992, Ricke examined Johnston at a hearing before the bankruptcy court in support of the trustee's motion to reject the Letter Agreement as an executory contract and to approve the sale of KTMA's assets to Sonlight Television. Goins maintains that this testimony was unsworn. Walter Goins' Statement ¶ 19. However, the transcript indicates that Johnston was, in fact, properly sworn. Affidavit of Jan Stuurmans Exh. A. at 6. The bankruptcy court accepted the testimony and ruled that the parties canceled the November 30, 1988 Letter Agreement prior to the commencement of KTMA's bankruptcy proceeding and therefore it was not an executory

contract which might create an enforceable interest in favor of Goins. The bankruptcy court found, in the alternative, that even if the Letter Agreement was an executory contract, the trustee was authorized to reject it. The bankruptcy court disallowed Goins' claim and when he appealed, the district court affirmed those orders. KTMA thereafter sold substantially all of its assets to Sonlight Television as part of the bankruptcy proceeding.

In the meantime, Goins applied to the FCC for a permit to construct a new FM broadcast facility in Eden Prairie, Minnesota but the FCC denied the application. Goins alleges that the reason for the denial of the permit was that his financial situation had

deteriorated as a result of the loss of value of his Halcomm stock. Thus, he charges the actions of the defendants caused him to be denied a permit by the FCC. Walter Goins' Statement ¶ 16.

Goins commenced this action on February 18, 1992. Goins named the following defendants: Dale W. Lang, Ronald R. Jensen, Halcomm, Inc., KX Acquisition Limited Partnership,[3] KTMA Acquisition Corp., Red River Broadcast Corp., Syndicated Communications, Syncom Capital Group, Broadcast Capital Inc., Donald R. Johnston, Larry B. Ricke, and Thomas J. Lallier (attorney for Sonlight Television). Goins alleges violations of

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3 KX Acquisition Limited Partnership currently owns and operates stations KXLI-TV and KXLT-TV.

the Racketeer Influenced and Corrupt Organizations (RICO) Act, the antitrust laws, Rule 10b-5, and federal civil rights laws.

All defendants have moved for summary judgment.[4] In general, plaintiff argues that summary judgment should not be granted for two reasons. First, the defendants have failed to meet their burden of showing that no genuine issue of material fact exists. Second, plaintiff has not had adequate time for discovery.

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[4] Defendants Syndicated Communications, Syncom, and Broadcast's motion is for dismissal. However, these defendants have included several documents and affidavits and have requested that to the extent the Court rules on these documents, the Court treat the motion as one for summary judgment.

DISCUSSION

I. Summary Judgment Standard

A movant is not entitled to summary judgment unless the movant can show that no genuine issue exists as to any material fact. Fed.R.Civ.P. 56(c). In considering a summary judgment motion, a court must determine whether "there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby Inc., 477 U.S. 242, 250 (1986). The role of a court is not to weigh the evidence but instead to determine whether, as a matter of law, a genuine factual conflict exists. AgriStor Leasing v. Farrow, 826 F.2d 732, 734 (8th Cir. 1987). "In making this

determination, the court is required to view the evidence in the light most favorable to the nonmoving party and to give that party the benefit of all reasonable inferences to be drawn from the facts." AgriStor Leasing, 826 F.2d at 734. When a motion for summary judgment is properly made and supported with affidavits or other evidence as provided in Fed.R.Civ.P. 56(c), then the nonmoving party may not merely rest upon the allegations or denials of the party's pleading, but must set forth specific facts, by affidavits or otherwise, showing that there is a genuine issue for trial. Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods Inc., 824 F.2d 582, 585 (8th Cir. 1987), cert. denied, 108 S.Ct. 707 (1988). Moreover, summary

judgment must be entered against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex Corp. v. Cartett, 477 U.S. 317, 324 (1986).

II. Rights of Dissenting Shareholders under Minnesota Law

The key to all of plaintiff's claims is that he is entitled to dissenting stockholder rights under Minnesota law and by denying him those rights, the defendants have violated federal statutes. In general, plaintiff maintains that Halcomm was required to pay him the value of his shares pursuant to Minnesota law because he objected to the merger contemplated in the November 30, 1988

Letter Agreement. His basic theme is that the defendants acted in concert, each contributing in a different manner, to intentionally deprive him of his statutory rights. Defendants argue that plaintiff has no dissenting stockholder rights because the transaction from which he dissented was never completed.

The Minnesota dissenters' rights statute reads, in relevant part:

> A shareholder of a corporation may dissent from, and obtain payment for the fair value of the shareholder's shares in the event of, any of the following corporate actions: .....
>
> (b) A sale, lease, transfer, or other disposition of all or substantially all of the property and assets of the corporation not made in the usual or regular course of its business.

Minn. Stat. 302A.471 Subd. 1 (1990). Defendants argue that the statute

requires a completed "sale" or "transfer"; an agreement to sell or transfer does not trigger the statute. Defendants point to the provision which sets out the "[p]rocedures for asserting dissenters' rights" and which indicates that the right to payment does not accrue until the "action takes effect." Minn. Stat. 302A.473 Subd. 4 and 5 (1990). The defendants also point to the General Comment to this provision which states that the "section continues the dissenter as a shareholder until the effectuation of the proposed corporate change, at which time all shareholders' rights are transformed." Minn. Stat. 302A.473, Gen. Cmt. Finally, defendants rely on Bowman v. MWCG Export Co., 1991 WL 30342 (Minn.Ct.App. March 12, 1991), an

unpublished opinion of the Minnesota Court of Appeals. In Bowman, shareholders dissented from a corporate change that was later invalidated for failure to follow proper procedure. The court held that the corporation need not buy out the dissenting shareholders "[g]iven that the Bowmans' rights remain intact due to the rescission of the change . . . ." Id. Defendants argue that plaintiff's investment in Halcomm similarly remained unchanged because the proposed sale of assets never took place. Thus, his right to payment never accrued.

Plaintiff argues that his right to payment was not contingent upon completion of the transaction. Plaintiff's general theory appears to be that the only reason the parties

abandoned the Letter Agreement was because he dissented, after which the defendants devised a plan to dispose of the plaintiff. Specifically, plaintiff argues that a construction of the statute which interprets the right to payment as contingent would defeat the statute's purpose. Plaintiff asserts that the "action" which triggers the right to payment is the approval by the shareholders and not the performance of the agreement. Plaintiff argues that the facts show that the shareholder vote was to approve the pre-dated Letter Agreement and after that vote his right to payment

accrued.[5] He argues that while the corporation may have the right to sue its co-participants for breach of contract or seek specific performance for their failure to fully perform the agreement, this is wholly irrelevant to the dissenting minority shareholder's right to receive payment. Plaintiff further argues, apparently in the alternative, that Lang's foreclosure on Halcomm's assets and the later removal of the stations from the air, along with the temporary transfer of some property to KTMA, constituted a "disposition"

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The shareholders received notice of the proposed sale of assets on November 18, 1988, the parties executed the Letter Agreement on November 30, 1988, Goins formally dissented on December 5, 1988, and the shareholder vote approving the transaction occurred on December 8, 1988.

sufficient to trigger his rights under the statute.

Plaintiff is obviously correct when he argues that the dissenters' rights statute is to protect minority shareholders. The problem is fitting his claim within the statute's terms. The court finds that under the plain meaning of Minn. Stat. 302A.471, it is the actual sale of corporate assets, not just an agreement to sell them, which triggers a dissenting shareholder's right to payment. Thus, to the extent that plaintiff relies on a violation of Minn. Stat. § 302A.471 to establish his federal claims, an essential element of those claims is lacking.

III. **Federal Claims**

Plaintiff asserts a variety of

federal statutory claims against all efendants. The precise claims plaintiff is making against the respective defendants is not entirely clear from the complaint. The Court will address the claims generally and will discuss the specific defendants only where necessary. All defendants have moved for summary judgment on the merits.[6]

A. **Antitrust claims**

Generally, there are three elements to a monopolization claim: (1) possession

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Defendants Syndicated Communications, Syncom, and Broadcast also assert a lack of personal jurisdiction and venue. Defendants Johnston and Rlcke argue that collateral estoppel applies, and that they are immune to suit. Finally, defendant Lallier argues that he was never properly served. Because the Court finds for the defendants on the merits, a discussion of the issues is unnecessary.

of monopoly power in the relevant market; (2) willful acquisition or maintenance of such power; (3) and causal antitrust injury." Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F-2d 919, 92~ (9th Cir.), cert. denied, 450 U.S. 921 (1980). Plaintiff alleges that the defendants failure to pay him under the dissenters' rights statute, in addition to the combined efforts of several defendants to conceal the Letter Agreement from him and the FCC, hurt his chances to obtain a permit to construct a new FM broadcast facility in Eden Prairie, Minnesota. Plaintiff alleges these actions tended to lessen competition and create a monopoly in the broadcasting market.

Defendants offer four grounds for dismissal of the antitrust claims. First,

defendants argue that because Goins has no rights as a dissenting shareholder under Minnesota law, his antitrust claim, fails. Second, defendants argue that plaintiff cannot show "antitrust injury," that is an "injury of the type the antitrust laws were intended to prevent." Brunswick Corp. v. Pueblo Bowl-O-Mat Inc., 429 U.S. 477, 489 (1977). The defendants point out that "the antitrust laws . . . were enacted for the protection of competition, not competitors." Brunswick, 429 U.S. at 488. Defendants assert that plaintiff's allegation that he might have been awarded a license for the Eden Prairie facility had defendants paid him for his shares is not an antitrust injury because the facility was actually built by

someone else. Thus, competition was not affected, only a competitor. In short, they argue that even if everything the plaintiff alleges were true, defendants are still entitled to judgment as a matter of law.

Third, defendants argue that even if everything the plaintiff alleges were true, plaintiff could not show that these actions were the proximate cause of his denial of an FCC permit to construct the Eden Prairie facility. They argue that plaintiff has admitted that any connection is mere "speculation." Affidavit of Mark A. Jacobson, Exh. B at 96.

Finally, defendants argue that plaintiff, as a Halcomm shareholder, has no standing to raise any claims based on

injury to the corporation. Solinger v. A & M Record. Inc., 718 F.2d 298, 299 (9th Cir. 1983) ("shareholder of a corporation injured by antitrust violations has no standing to sue in his or her own name"). The extent to which plaintiff is basing his claims on injury to Halcomm, however, is not clear.

The Court finds that plaintiff has not offered adequate evidence a monopolization claim. Most importantly, plaintiff has ignored his burden of showing that the defendants possessed monopoly power. See Ryko Mfg. Co. v. Eden Services, 823 F.2d 1215, 1232 (8th Cir.1987), cert. denied, 108 S.Ct. 751 (1988). Moreover, plaintiff's arguments that he has sustained an antitrust injury, i.e., the type of injury the

antitrust laws are intended to prevent, are unpersuasive. Plaintiff has only alleged that he, as a competitor, was hurt; he has not offered evidence that competition suffered. Accordingly, the Court will grant summary judgment for all defendants on plaintiff's antitrust claims.

B. RICO Claims

Plaintiff alleges that the actions of several defendants to defraud him of his rights under the dissenters' rights statute, along with certain defendants' efforts to collect an unlawful debt, constituted violations of the RICO Act. In order to establish a RICO cause of action plaintiff must prove the existence of four elements: (1) conduct, (2) of an enterprise, (3) through a pattern, (4) of

racketeering activity. See Sedima. S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985); Simon v. Fribourg, 650 F.Supp. 319, 323 (D.Minn. 1986). In order to establish a pattern of racketeering activity, plaintiff must show at least two predicate acts. H.J. Inc. v. Northwestern Bell TelePhone Co., 109 S.Ct. 2893, 2899 (1989); Granite Falls Bank v. Henrickson, 924 F.2d 150, 153 (8th Cir. 1991). However, "while two acts are necessary, they may not be sufficient." H.J. Inc., 109 S.Ct. at 2899 (quoting Sedima, 473 U.S. at 496 n. 14)). "It is not the number of predicates but the relationship that they bear to each other or to some external organizing principle. . . .[T]o prove a pattern of racketeering activity a plaintiff . . .

must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity." H.J. Inc., 109 S.Ct. at 2900 (emphasis in original).

Plaintiff alleges that the predicate acts included denial of his dissenter's rights, fraud in a bankruptcy case, and violations of usury laws. Plaintiff's claim that he was denied his dissenter's rights is discussed supra. Plaintiff also alleges that defendants Johnston, Ricke, and Lallier acted to obstruct justice in a bankruptcy case. Plaintiff alleges that Johnston, in his capacity as bankruptcy trustee, misrepresented to the bankruptcy court that KTMA, or Johnston personally, filed the Letter Agreement with the FCC. Plaintiff alleges that

Johnston had Sonlight Television file the agreement because Sonlight was not subject to the regulatory requirements of the FCC and that this action would provide the FCC with the opportunity to rule on the agreement without KTMA submitting it under the FCC's rules. Plaintiff does not, however, explain the significance of this allegation.

Plaintiff further alleges that defendants offered unsworn testimony to the bankruptcy court in an attempt to obstruct justice.

Defendants argue that plaintiff has not offered evidence of a predicate act. Plaintiff's allegation that certain defendants participated in the purported bankruptcy fraud is presumably directed only at Johnston, Ricke, and Lallier.

These defendants assert that plaintiff has offered no evidence to support his allegation that they elicited unsworn and false testimony before the bankruptcy court, while they have produced the official transcript which indicates that the testimony was sworn. Stuurmans Aff., Exh. A. at 6.

Finally, defendants argue that the usury charge fails for several reasons: (1) plaintiff was released from the allegedly usurious loan in 1987 and Minnesota law requires that a usury claim be brought within two years; (2) plaintiff cannot show that the alleged usury was the proximate cause of this damages; (3) the Minnesota usury statutes do not apply to corporations; (4) the Minnesota usury statutes are inapplicable

to loans of $100,000 or more where a written contract provision exists; and (5) in order to state a claim for collection of an "unlawful debt," plaintiff must not only prove that the loans were usurious, but must allege and prove that these defendants are in a continuing business of usurious lending.

Plaintiff has failed to offer evidence of predicate acts sufficient to establish a pattern of racketeering activity. Plaintiff has offered no evidence of bankruptcy fraud other than the bald assertion that defendant Johnston offered unsworn testimony before the bankruptcy court. Defendants have provided the Court with a transcript of that hearing which indicates the testimony was, in fact, sworn. Moreover,

plaintiff's charge that defendants attempted to collect an unlawful debt fails because a loan to a corporation cannot be usurious. The loan in question was made to LEO, not Goins, although Goins did serve as guarantor. The loan was not unlawful. Jones v. Nelson, 432 N.W.2d 792, 796 (Minn.Ct.App. 1988), is directly on point and holds that, under Minnesota law, guarantors of loans to corporations may not assert the defense of usury. "The thrust of the corporate loan exception. is that entities involved in commercial ventures ~~need~~ not receive the same protection as financially unsophisticated consumers obtaining loans for personal, non-business purposes." 432 N.W.2d at 796. The Court finds that as a matter of law the loan was not unlawful

and thus does not constitute a predicate act. In short, plaintiff has failed to raise a genuine issue of material fact as to whether defendants were engaged in a pattern of racketeering activity.

C. Securities Fraud Claims

Plaintiff alleges that Lang breached a fiduciary obligation to him as a minority shareholder in a closely-held corporation. Plaintiff alleges that this amounted to a violation of Rule 10b-5 because Lang subsequently purchased limited partnership units based on some inside information he obtained as a result of this breach of fiduciary duty.

The elements of a cause of action under Rule 10b-5 are (1) misrepresentation or omission of a material fact by the defendant, (2)

scienter, i.e., made with intent to deceive, manipulate, or defraud, (3) in connection with the sale or purchase of securities causing, (4) damages to a plaintiff who relied on the misrepresentation or omission. Harris v. Union Electric Co., 787 F.2d 355, 362 (8th Cir), cert. denied, 107 S.Ct. 94 (1986). Only purchasers and sellers of securities have standing to bring a Rule 10b-5 claim. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975).

Plaintiff admits that he was not a purchaser or a seller of these limited partnership units. Memorandum in Opposition to Summary Judgment of Defendants Dale W. lang, Ronald R. Jensen, Halcomm, Inc., and KX Acquisition Ltd. Partnership at 22. Thus, plaintiff

does not have standing to assert this claim.

D. Civil Rights

1. 42 U.S.C. § 1985(3)

Plaintiff alleges that Lang, Syncom Capital, and Broadcast Capital conspired to deprive him of his constitutional rights in violation of 42 U.S.C. 1985(3). To make out a valid cause of action under 42 U.S.C. 1985(3), plaintiff must prove four elements: (1) a conspiracy; (2) a purpose of depriving a person of equal protection; (3) an act in furtherance of the conspiracy; and (4) an injury. United Brotherhood of Carpenters & Joiners of America v. Scott, 463 U.S. 825, 828-29 (1983). Section 1985 is applicable only where there is "some racial, or perhaps otherwise class-based,

invidiously discriminatory animus behind the conspirators' action." Griffin v. Breckenridge, 403 U.S. 88, 102 (1971). Plaintiff alleges that these defendants took actions to thwart his opportunity to participate as a racial minority applicant at the FCC and these actions violated his civil rights under the First, Fifth, and Fourteenth Amendments.

Defendants seek summary judgment on plaintiff's claim of a violation of Section 1985(3). Defendants argue that the Supreme Court has "squarely held" that "economic injury was not the type of wrong for which [Section 1985(3)] provides a remedy." Gill v. Farm Bureau Life Insurance Co., 906 F.2d 1265, 1270 (8th Cir. 1990) (citing United Brotherhood of Carpenters & Joiners v.

Scott, 463 U.S. 825, 836-39 (1983)). In United Brotherhood of Carpenters & Joiners v. Scott, 103 S.Ct. 3352, 3361 (1983), the Supreme Court held that "actions generally resting on economic motivations should be deemed beyond the reach of 1985(3). Economic and commercial conflicts, we think, are best dealt with by statutes, federal or state, specifically addressed to such problems, as well as by the general law proscribing injuries to persons and property." Defendants argue that plaintiff's suit is for economic harm, i.e., the value of his Halcomm shares, and thus fails as a matter of law.

Defendants also argue that plaintiff has offered no evidence to prove the necessary racial animus to establish a

section 1985(3) claim. When a plaintiff offers no evidence of a discriminatory motivation behind the alleged conspiracy, summary judgment is appropriate. Dowsey v. Wilkins, 467 F.2d 1022, 1026 (5th Cir. 1972). The Court finds that plaintiff has not offered any evidence of a discriminatory motive. In fact, Syncom and Broadcast, which are-by law restricted to making loans to minority-owned companies, are in the business of assisting racial minorities.

The Court finds that plaintiffs section 1985(3) claim is essentially for economic harm and is better addressed by other statutes. Moreover, plaintiff has offered no evidence of a discriminatory motivation. Thus, summary judgment is appropriate.

2. **42 U.S.C. § 1985(2)**

Plaintiff also alleges that Lallier, Ricke, and Johnston conspired to present unsworn testimony to the bankruptcy court in order to get a ruling disallowing plaintiff's claim and this was done to obstruct justice with the intent to deny plaintiff Goins equal protection. Plaintiff claims these actions amounted to an obstruction of justice and a violation of 42 U.S.C. § 1985(2).

To establish a claim for violation of section 1985(2) plaintiff must show: (1) an obstruction of justice; (2) done with an intent to deny plaintiff equal protection. Williams v. St. Joseph Hospital, 629 F.2d 448, 451 (7th Cir. 1980). Intent to deprive a person of equal protection means there must be a

showing of racial animus. Griffin, 403 U.S. at 102.

The Court finds that plaintiff's section 1985(2) claim does not raise a genuine issue of material fact for two reasons. First, defendant has offered unrebutted evidence, in the form of a transcript, that the testimony was in fact sworn. Second, plaintiff has not offered any evidence of a discriminatory motive.

3. **42 U.S.C. 1983**

Plaintiff asserts a third civil rights claim for violation of 42 U.S.C. 1983. To maintain a section 1983 action a plaintiff must show a person has deprived him of his constitutional rights under color of state law. West v. Atkins, 108 S.Ct. 2250 (1988). Private party acts may

be under color of state law if there is a sufficiently close nexus between the state and the challenged action so that the action may be fairly said to be an action of the state. Lopez v. Dept. of Health Services, 939 F.2d 881, 883 (9th Cir. 1991). Without specifying particular parties, plaintiff alleges that defendants violated his constitutional rights through the wrongful use and exercise of the State of Minnesota's foreclosure statutes, sheriff's auction, and other methods of state law repossession of Halcomm assets. The plaintiff specifically asserts that these actions were taken under color of state law.

Defendants request that the Court grant summary judgment on the section

1983 claim because plaintiff has failed to allege an action taken under color of state law. Defendants rely on Lugar v. Edmondson Oil Co. Inc., 102 S.Ct. 2744 (1982), and Hassett v. Lemay Bank and Trust Co., 851 F.2d 1127 (8th Cir. 1988), for the proposition that seizure of property, even when aided by a sheriff, is insufficient to support a section 1983 action.

Plaintiff attempts to rebut defendants argument that there has been no action under color of state law. Plaintiff relies on Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970), which held that a plaintiff can maintain a section 1983 action against a private party if he can show the private party was "a willful participant in joint

activity with the State or its agents."

The theory of plaintiff's claim, as best the Court can ascertain, is that the foreclosure on Halcomm's assets, and the resulting decline in value of this Halcomm shares, deprived him of a property interest and because the defendants needed to utilize the foreclosure statute to effectuate that unconstitutional taking, the color of state law requirement is satisfied. Lugar v. Edmondson Oil Co., Inc., 102 S.Ct. 2744 (1982), holds that an action is taken under color of state law only if the "conduct is ... chargeable to the State. Without a limit such as this, private parties could face constitutional litigation whenever they seek to rely on some state rule governing their

interactions with the community surrounding them." 102 S.Ct. at 2754. "Private misuse of a statute by a private actor is not sufficient to state a claim under section 1983." Hassett, 851 F.2d at 1129. This is true even if a plaintiff alleges that the private actor fraudulently procured the cooperation of a government official. 851 F.2d at 1130. In this case, plaintiff alleges that defendants wrongfully obtained the assistance of government officials when foreclosing on Halcomm's assets. Thus, Hassett controls and summary judgment for defendants on the section 1983 claims is appropriate.

IV. State Law Claims

Plaintiff has acknowledged that the state law claims involving shareholder

rights are not formally before the Court but he "reserves the right to seek to amend his complaint as necessary to include any and all pendent state law claims, even in the light of a possible dismissal of his federal claims, in the interest of judicial economy." Mem. in Opp. to Mot. for Summ. J. for Dale W. Lang, Ronald R. Jensen, Halcomm, Inc., and KX Acquisition Limited Partnership at 20.

In United Mine Workers of America v. Gibbs, 383 U.S. 715, 726 (1966), the Supreme Court stated that "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." 383 U.S. at 726. This statement has been subsequently

qualified somewhat. The Supreme Court has since stated that the decision of whether to proceed with state claims lacking an independent basis of federal jurisdiction after all federal claims have been dismissed is discretionary with the trial court. Rosado v. Wyman, 397 U.S. 397, 404 (1970). Factors to consider in the exercise of the Court's discretion include considerations of judicial economy, convenience and fairness to litigants, and the avoidance of needless decisions of state law. Gibbs, 383 U.S. at 726. Each of the relevant factors supports a ruling that if plaintiff wants to pursue his "reserved" claims under state law, he should do so in state court. Accordingly, plaintiff's state law claims will be dismissed without

prejudice.

V. Opportunity for Discovery

The pretrial scheduling order provides that all motions which seek to amend the pleadings or add parties must be filed before November 1, 1992 and discovery shall terminate on March 1, 1993. Plaintiff argues that the dismissal of claims at this time would prejudice his ability to determine if additional claims or parties should be added. Plaintiff requests the Court delay

consideration of these motions[7] until additional discovery has been completed as to the material facts. Plaintiff does not indicate with any degree of specificity the types of additional evidence he expects discovery to produce.

In response, defendants assert that they have produced documents at plaintiff's request on at least three separate occasions. Jacobson Supp. Aff. ¶ 3 & 4. They also assert that Goins has commenced the depositions of some

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7 Plaintiff makes this request specifically in one motion only, Memorandum of Law in Opposition to Motion for Summary Judgment of Defendants Donald R. Johnston and Larry B. Ricke 1-2, but because he has in several places cross-referenced his various memoranda in opposition, the Court will treat it as a request to delay rulings on all motions until further discovery is completed.

defendants and has received timely answers to his interrogatories. Id.

Rule 56 "does not require trial courts to allow parties to conduct discovery before entering summary judgment." United States Through Small Business Admin. v. Light, 766 F.2d 394, 397 (8th Cir. 1985). "[A] motion for summary judgment can be filed at any time after twenty days from the commencement of the action or service of the motion on the other party. The party who is faced with a summary judgment motion before he has conducted discovery may . request the court to postpone ruling on the motion until he conducts some discovery." Light, 766 F.2d at 397 (emphasis in original). However, the opposing party must show how postponement of a ruling on the summary

judgment motion will enable him to discover evidence that will rebut the movant's showing of the absence of a genuine issue of fact. Willmar Poultry Co. v. Morton-Norwich Products, 520 F.2d 289, 297 (8th Cir. 1975), cert. denied, 424 U.S. 915 (1976). Nevertheless, the Court has wide discretion to balance the rights and needs of both parties when deciding this question. Elvis Presley Enterprises Inc. v. Elvisly Yours, Inc., 936 F.2d 889, 893 (6th Cir. 1991). Plaintiff asserts that he needs additional time to discover other possible actions that may serve as RICO predicate acts and to discover whether certain defendants who have plead an immunity defense are entitled to the defense. Plaintiff does not, however,

indicate with any specificity what type of discovery he intends to conduct. Plaintiff's vague assertions that further discovery would develop genuine issues of material fact do not warrant a postponement of a summary judgment ruling. United States v. Bob Stofer Oldsmobile-Cadillac, 766 F.2d 1147, 1153 (7th Cir. 1985).

VI. Sanctions

Defendant Lallier has asked the Court to sanction plaintiff pursuant to Rule 11. After careful consideration, the Court has determined that sanctions are not appropriate in this case.

Based upon the foregoing, and upon all the files, records and proceedings herein,

IT IS ORDERED that:

1. defendants Dale W. Lang, Ronald R. Jensen, Halcomm, Inc., and KX Acquisition Limited Partnership's motion for summary judgment on all federal claims is granted;

2. defendants Syndicated Communications, Inc., Syncom Capital Corp., and Broadcast Capital, Inc.'s motion for summary judgment on all federal claims is granted;[8]

3. defendants Donald R. Johnston and Larry B. Ricke's motion for summary judgment on all federal claims is granted;

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[8] These defendants have requested that to the extent the Court relies upon admissible evidence in dismissing certain claims, that this motion be treated as one for summary judgment.

4. defendant Thomas J. Lallier's motion for summary judgment on all federal claims is granted;

5. defendant Lallier's motion for Rule 11 sanctions is denied; and

6. all of plaintiff's state claims are dismissed without prejudice.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Judge Harry H. MacLaughlin
United States District Court

Dated: October 10, 1992

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-3717MN

N. Walter Goins,
Plaintiff-Appellant,

v.

Dale W. Lang; Ronald R. Jensen; Halcomm, Inc., a Minnesota corporation; KX Acquisition, Limited Partnership, a Minnesota limited partnership and their officers and directors, and the signatories, lenders and participants in a November 30, 1988 Letter Agreement of Halcomm; KTMA Acquisition Corp., a New York corporation; Red River Broadcast Corp., a Minnesota corporation, including Syndicated Communications, Inc. of Washington, D.C. and its subsidiary, Syncom Capital Corp.; Broadcast Capital, Inc., a Virginia corporation;

Defendants-Appellees,

Donald R. Johnston; Larry B. Ricke; Thomas J. Lallier,

Defendants.

Submitted: June 17, 1993
Filed: June 25, 1993

Appeal from the United States District Court of for the District of Minnesota.

Before McMILLIAN, FAGG, and HANSEN, Circuit Judges.

PER CURIAM.

N. Walter Goins appeals the district court's grant of summary judgment in favor of designated appellees. After a careful review of the record, we agree with the district court's rulings on the questions presented by the appeal. Accordingly, we affirm on the basis of the district court's opinion. We also deny Goins motion to supplement the record.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States Court of Appeals

FOR THE EIGHTH THE CIRCUIT

No. 92-3717MNMI
N. Walter Goins,
Appellant,

vs .
Dale W. Lang; et al.,
Appellees.
Appeal from the United States District Court for the District of Minnesota

The petition for rehearing by the panel is denied.

August 6, 1993
Order Entered at the Direction
of the Court: Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit